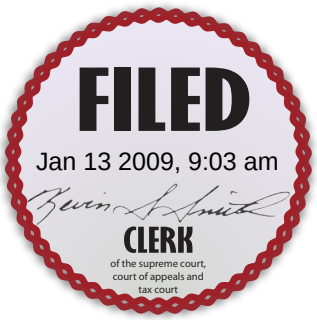

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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW THOMAS FRANKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0806-CR-532
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 2
The Honorable Carl Van Dorn, Senior Judge
Cause No. 79D02-0802-FD-3

January 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Matthew Thomas Franks (Franks), appeals his sentence following a guilty plea to sexual misconduct with a minor, a Class D felony, Ind. Code § 35-42-4-9(b), and his enhancement as a repeat sexual offender, I.C. § 35-50-2-14.

We affirm.

ISSUES

Franks raises one issue on appeal, which we restate as the following two issues:

(1) Whether the trial court abused its discretion in finding aggravators and mitigators; and

(2) Whether his sentence is appropriate in light of his character and the nature of his offense.

FACTS AND PROCEDURAL HISTORY

On January 5, 2008, Franks was living with his brother, Thomas Franks (Thomas), in Lafayette, Indiana. Thomas' daughter was on a weekend visit with her father and had her friend, fourteen-year-old K.F., spending the night with her. K.F.'s mother had met Franks in the past and had established a relationship with him, trusting him around her daughter.

Sometime during the evening, Franks returned home from work intoxicated. Thomas, his daughter, and K.F. were watching a movie in the living room. Franks sat down on the couch, next to K.F and started to fondle K.F.'s thigh and attempted to kiss her. K.F. was scared and tried to move away from him. Then, Thomas left the living room to go smoke a cigarette and when he returned, he noticed Franks hugging K.F. and either kissing her neck

or whispering in her ear. Thomas yelled at Franks to stop touching K.F. As K.F. began to cry, Thomas' daughter and K.F. went into a bedroom. After Thomas told Franks to leave the house, he went to check on K.F. and noticed that she was very scared and was crying. Thomas drove K.F. home.

On February 7, 2008, the State filed an Information charging Franks with Count I, sexual misconduct with a minor, a Class D felony, I.C. § 35-42-4-9(b); Count II, sexual battery, a Class D felony, I.C. § 35-42-4-8; and an enhancement as a repeat sexual offender, I.C. § 35-50-2-14. On May 2, 2008, Franks and the State entered into a plea agreement, wherein Franks agreed to plead guilty to Count I and Count III, in exchange for the State dismissing Count II, with sentencing left to the trial court's discretion. On May 29, 2008, during the sentencing hearing, the trial court found as aggravating factors: 1) Franks' criminal history; 2) the harm suffered by the victim of the offense was significant and greater than the elements necessary to prove the commission of the offense and 3) Franks was in a position of trust. The trial court found as mitigating factors: 1) Franks' guilty plea and 2) Franks had taken responsibility for the crime. The trial court sentenced Franks to three years on Count I and one and one-half years on the enhancement as a repeat sexual offender, for an aggregate sentence of four and one-half years with the Department of Correction.

Franks now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Franks contends that the trial court abused its discretion by sentencing him to an executed sentence of four and one-half years. Because Franks committed his offense after April 25, 2005, we review his sentence under the advisory sentencing scheme. Under this scheme, a person who commits a Class D felony shall be imprisoned for a fixed term of between six months and three years, with the advisory sentence being one and one-half years. I.C. § 35-50-2-7. Furthermore, when adjudicated a repeat sexual offender, the trial court may sentence a person to an additional fixed term that is the advisory sentence for the underlying offense, with the additional sentence not to exceed ten years. I.C. § 35-50-2-14(e).

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *aff'd on reh'g* 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. One way in which a trial court may abuse its discretion is by failing to enter a sentencing statement at all. *Id*. Another example includes entering a sentencing statement that explains the reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id*. at 490-91.

Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id*. at 491. This

is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id*.

This does not mean that criminal defendants have no recourse in challenging sentences they believe are excessive. *Id*. Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id*. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id*.

II. *Aggravators and Mitigators*

Here, Franks first argues that the trial court abused its discretion in finding that the harm caused to K.F. was significant and greater than the elements necessary to prove the commission of the offense. Specifically, he asserts that the impact that the crime had on K.F. was typical of that associated with a victim of sexual misconduct and thus the harm to K.F. was not greater than ordinary. The record reflects that, with the exception of her school counselor, K.F. refuses to talk to anyone about the incident. She speaks with her school counselor two to three times per week. At the time of the sentencing hearing, K.F. could not bring herself to come to court to testify on her own behalf because she did not want to look at

anyone in the courtroom. We have previously held that these effects, while not inconsequential, are typical of what victims of molestation experience. *See, e.g.*, *Taylor v. State*, 891 N.E.2d 155, 161 (Ind. Ct. App. 2008), *trans. denied* (having nightmares and receiving counseling does not result in the victim being more traumatized by the crime than other victims of molestation); *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App, 2001), *trans. denied* (nightmares and counseling does not amount to an impact distinct from that felt by similarly situated victims). Thus, we cannot say this aggravator is supported by the record.

Secondly, Franks disputes the trial court's aggravator that he was in a position of trust. The evidence presented at the sentencing hearing reflects that K.F.'s mother had met Franks in the past and they had established enough of a relationship that she trusted leaving K.F. in his company. Additionally, Franks himself acknowledged that K.F.'s mom had placed her trust in him and apologized at the sentencing hearing for breaking that trust. Thus, we find that the aggravator is supported by the record.

Next, Franks asserts that the trial court "failed to give [his plea agreement] significant weight." (Appellant's App. p. 10). However, pursuant to *Anglemeyer*, 868 N.E.2d at 491, this argument is no longer available for our review.

Although one of the three aggravators found by the trial court is not supported by the record, we may affirm if we can say with confidence that the trial court would have imposed the same sentence had it considered only the proper aggravators. *Anglemeyer*, 868 N.E.2d at 491. Here, based on the remaining two valid aggravators and the trial court's focus on

Franks' position of trust during the sentencing hearing, we are confident that the trial court would have imposed the same sentence even if it did not consider the aggravator we have found to be unsupported.

III. *Appropriateness of the Sentence*

In addition, we find that Franks' sentence is appropriate in light of his character and nature of the crime. With regard to Franks' character, we note that he has a history of criminal and delinquent activity. As a juvenile, he was arrested for child molesting in 1994, curfew violation in 1995, and minor consumption in 1996. He was adjudicated for theft, as a Class D felony if committed by an adult in 1997. Franks' adult criminal history consists of a misdemeanor conviction for theft and a Class D felony theft in 1999, a misdemeanor conviction for possession of marijuana in 2000, and a misdemeanor conviction for operating with an unlawful blood or breath alcohol concentration in 2005. Most importantly, we note that, in 2001, Franks was convicted of a Class C felony child molesting.

Turning to the nature of the crime, we observe that Franks committed the instant offense in the presence of K.F.'s friend and her friend's father. Franks' inappropriate behavior scared K.F. and only stopped when his brother interceded. In light of these circumstances, we conclude that Franks' sentence is appropriate.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Franks.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.